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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 942.

ALTERMAN TRANSPORT LINES, INC., et al.,
Appellants,

v.

PUBLIC SERVICE COMMISSION OF TENNESSEE et al.,
Appellees.

APPELLEES' MOTION TO DISMISS

and

BRIEF IN SUPPORT THEREOF.

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APPELLEES' MOTION TO DISMISS.

Pursuant to Rule 16 of the Supreme Court of the United States, the appellees move the court to dismiss this appeal on the ground that the three-judge district court was not required to be convened in this case as the federal constitutional questions relating to the validity of the state statute presented by the appellants' petition are wholly unsubstantial in view of earlier decisions of this Court. Therefore, a direct appeal may not be taken to the Supreme Court of the United States from the action of the district court.

U. S. C., Section 2281, does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking, nonexistent.

The Supreme Court of the United States lacks jurisdiction over this direct appeal from a three-judge district court because the three-judge court was improperly convened as the allegations of the petition relating to the unconstitutionality of the Tennessee statute are insubstantial.

IN THE

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ALTERMAN TRANSPORT LINES, INC., et al.,
Appellants,

v.

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Appellees.

BRIEF IN SUPPORT OF APPELLEES' MOTION TO DISMISS.

OPINION BELOW.

The opinion delivered in the court below is not as yet reported. A copy of the opinion is attached as Appendix I to appellants' brief.

JURISDICTIONAL STATEMENT.

Appellants contend jurisdiction for this appeal is based on Title 28 of the **United States Code**, Section 1253. It is the purpose of appellees' motion to dismiss and this accompanying brief to challenge that contention as will more fully appear herein.

STATUTES INVOLVED.

28 U. S. C., § 1253. **Direct appeals from decisions of three-judge courts.**

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 928.

28 U. S. C., § 2281. **Injunction against enforcement of State statute; three-judge court required.**

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by the district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

As stated by the appellants on page 4 of their brief, they challenged the validity of **Chapter 9, Title 67,** of the **Tennessee Code Annotated,** portions of which are attached to the appellants' brief as Appendix III; however, certain sections germane to the issues in this case were not included in the appendix to the appellants' brief and they have been included as an appendix to this brief as Appendix 1. Those sections of Tennessee Code Annotated which have been added by inclusion in the appendix to this brief are §§ 67-902, 67-918 and 67-919.

QUESTIONS INVOLVED.

1. Does the Supreme Court of the United States have jurisdiction to hear a direct appeal from a three-judge federal court where a State statute is challenged on insubstantial federal constitutional grounds, though substantial federal questions may exist in the case other than the constitutionality of the State statute?

2. Does the challenge of a State statute present a substantial federal constitutional question in the light of prior decisions of the Supreme Court, where the statute provides for the assessment of an ad valorem tax on the trucks and trailers of foreign corporate motor carriers in such State based on the number of miles operated within, into and through the State by all of the motor vehicles of any such carrier, even though the trucks and trailers were neither permanently in those jurisdictions nor operated there on fixed routes and regular schedules?

STATEMENT OF THE CASE.

Chapter 9, Title 67, of Tennessee Code Annotated, insofar as it relates to appellants as irregular route carriers, provides for the assessment for taxation of appellants' property on the basis of a formula which fairly apportions the tax to the commerce carried on in Tennessee by assessing and levying a tax on an average portion of property permanently within the State (Appellants' brief, Appendix III, page 13a, Appellees' brief, Appendix 1).

On November 15, 1965, in **Burnham Van Service et al. v. Cayce R. Pentecost et al.,** 382 U. S. 106, 15 L. ed. 2d 191, this court dismissed an appeal from the Supreme Court of Tennessee for want of a substantial federal question in a case in which the Supreme Court of Tennessee had denied a writ of certiorari to review a decision of the Court of Appeals of Tennessee holding **Chapter 9, Title 67,** of the **Tennessee Code Annotated,** valid and not in violation of either the "Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution or of Article I, Section 8 of the Constitution of the United States." The full text of the decision of the Court of Appeals is attached hereto as Appendix 2 and is styled **Aero Mayflower Transit Company et al. v. Cayce R. Pentecost et al.** This is the same case which was dismissed on appeal to the Supreme Court of the United States under the style of **Burnham Van Service et al. v. Cayce R. Pentecost et al.,** *supra,* the difference in the names being caused by one of the appellants, Aero Mayflower Transit Company, withdrawing from the case prior to the appeal to the Supreme Court of the United States.

The appellants in the instant case and those in **Burnham Van Service et al. v. Cayce R. Pentecost et al.,** *supra,*

raise the same constitutional issues in attacking the identical statute under similar allegations of facts. This court dismissed the appeal in **Burnham Van Service et al. v. Cayce R. Pentecost et al.**, *supra*, for want of a substantial federal question and the decision in the **Burnham** case is applicable to the present case as the constitutional questions, the facts and the statute under attack are the same in the two cases.

Prior decisions of this court have sustained the levy of *ad valorem* taxes by states and their political subdivisions on the vehicles and vessels of foreign corporations, under statutes similar to the one here in question, even though such carrier facilities were neither permanently in those jurisdictions nor operated there on fixed routes and regular schedules. **Ott v. Mississippi Valley Barge Line Co.**, 336 U. S. 169, 93 L. ed. 585, 69 S. Ct. 432; **Nashville, C. & St. L. R. Co. v. Browning**, 310 U. S. 362, 365, 84 L. ed. 1254, 1255, 60 S. Ct. 968; **Pullman's Palace Car Company v. Pennsylvania**, 141 U. S. 18, 35 L. ed. 613, 11 S. Ct. 876.[1]

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[1] **Central R. Co. of Pa. v. Pennsylvania**, 370 U. S. 607, 8 L. ed. 2d 720, 82 S. Ct. 1297, cited and relied on by the appellants, was decided on the evidence and the court held that the appellant failed to "sustain its burden of proving that a tax situs had been acquired elsewhere." The court in the **Central R. Co. of Pa.** case did not have before it a taxing statute of a non-domiciliary State for construction and that case is not in point as it was decided strictly on the presence or absence of proof and is not similar to the instant case.

ARGUMENT.

The Supreme Court of the United States Lacks Jurisdiction to Hear a Direct Appeal From an Improperly Convened Three-Judge Federal Court.

It is the position of the appellees that the Supreme Court of the United States is without jurisdiction of this direct appeal from the district court as the three-judge district court was not properly convened. The allegations of the appellants' petition to the district court attacking the validity of **Chapter 9 of Title 67, Tennessee Code Annotated,** are wholly without substance by reason of prior decisions of this Court which have resolved the constitutional questions raised concerning the State statute. This Court has held the same constitutional attack on this statute to be without substance in **Burnham Van Service et al. v. Pentecost et al.,** *supra*, in which an appeal from the action of the Tennessee courts upholding the statute was dismissed for want of a substantial federal question.

Prior decisions of this Court have sustained the constitutionality of statutes similar to the Tennessee statute here under attack, and the same constitutional issues raised by the appellants in this case have been previously determined in favor of the constitutionality of the statutes. **Ott v. Mississippi Valley Barge Line Co.,** *supra*; **Nashville, C. & St. L. R. Co. v. Browning,** *supra*; **Pullman's Palace Car Company v. Pennsylvania,** *supra*.

Statutory Requirements for Appeal.

The appellants base their appeal on 28 U. S. C., § 1253, which provides for a direct appeal to the Supreme Court of the United States from an order of a three-judge district court granting or denying an injunction in a suit of proceeding **required by an Act of Congress to be heard and determined by a three-judge district court.** Where the three-judge district court was not **required** to hear the case by an Act of Congress the Supreme Court is without

jurisdiction to hear the case on a direct appeal from the three-judge district court.

The three-judge court was constituted under the supposed authority of 28 U. S. C., § 2281 (Appellants' Brief, page 1a). The specific provisions of 28 U. S. C., § 2281, limit the requirements for a three-judge district court to proceedings in which a federal district court is asked to enjoin the enforcement of a state statute "on the ground of the unconstitutionality of such statute." This Court has specifically held that 28 U. S. C., § 2281, "does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent;" and that "three judges are similarly not required when, as here, prior decisions make frivolous any claim that a state statute" is unconstitutional. **Bailey v. Patterson,** 269 U. S. 31, 33, 7 L. Ed. 2d 512, 82 S. Ct. 549.

28 U. S. C., § 2281, comes into play only when an injunction is sought "upon the ground of the unconstitutionality" of a State statute. There is no such ground when the constitutional issue presented is insubstantial and essentially fictitious. **Bailey v. Patterson,** *supra.*

Cases Denying Jurisdiction.

The appellants correctly state the law that "In an injunctive action challenging a State statute on a substantial federal constitutional ground, both the three-judge court and this court on direct appeal have jurisdiction over all claims raised against the State statute." The converse is also true and it is well settled that where a State statute is challenged on an insubstantial claim of unconstitutionality the three-judge court is not required by an Act of Congress and a direct appeal cannot be taken to the Supreme Court from an order of three-judge court denying an injunction. **Bailey v. Patterson,** *supra*; **Phillips v. United States,** 312 U. S. 246, 248, 85 L. Ed. 800, 803, 61 S. Ct. 480; **Ex parte Bransford,** 310 U. S. 354, 84 L. Ed. 1249, 60 S. Ct. 947.

If the challenge of the State statute is not on a substantial federal constitutional ground a direct appeal to the Supreme Court will not lie, even though there may be other substantial federal questions involved in the case which are reviewable by the Circuit Court of Appeals. **Phillips v. United States,** *supra.* In the instant case, the appellants have preserved their rights to an appeal to the Circuit Court of Appeals for the 6th Circuit which has deferred docketing this case in that court pending the action of the Supreme Court on the jurisdictional question. A copy of the order of the Circuit Court of Appeals is attached hereto as Appendix 3. The disallowance of a direct appeal to the Supreme Court will not deprive the appellants of a review of the district court's decision as they have preserved their rights to appeal to the Circuit Court of Appeals.

Some of the cases cited by the appellants on page 3 of their brief as sustaining jurisdiction are cases in which state or federal statutes were challenged on clearly substantial federal constitutional grounds and were not cases where the constitutional questions raised had been previously settled by prior decisions of the Supreme Court.

Kesler v. Department of Public Safety, 369 U. S. 153, 7 L. ed. 2d 641, 82 S. Ct. 807, cited by the appellants on page 3 of their brief, has been specifically overruled by **Swift and Company v. Wickham,** 382 U. S. 111, 15 L. ed. 2d 194, 86 S. Ct. 258, and is no longer authority on the jurisdictional point.

California Water Service Co. v. City of Redding, 304 U. S. 252, 82 L. ed. 1323, 58 S. Ct. 865, is not authority for a direct appeal from a three-judge district court under circumstances similar to those in the instant case. In **California Water Service Co. v. Redding,** *supra,* the court held that a federal question averred as the basis for federal jurisdiction may be plainly insubstantial either because obviously without merit or because its unsoundness so clearly results from previous decisions of the Su-

preme Court of the United States as to foreclose the subject and, if the federal question lacks substance, the presence of a local question will not save jurisdiction.

For the reasons stated, the cases cited by the appellants in support of the jurisdiction of the Supreme Court on a direct appeal from a three-judge district court are not applicable to this case.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the motion of the appellees should be granted and this direct appeal to the Supreme Court be dismissed.

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Certificate of Service.

I, Milton P. Rice, Assistant Attorney General, State of Tennessee, one of the attorneys for appellees, movants herein, do hereby certify that I have served a copy of the foregoing motion to dismiss and brief in support thereof upon the Honorable David S. Cordish, Cordish & Cordish, 613 Munsey Building, Baltimore, Maryland, by mailing same to him at said address, United States postage prepaid.

This .. day of January, 1967.

.....

APPENDICES.

APPENDIX 1.

Chapter 9, Section 67, Tennessee Code Annotated—Assessment of Utilities and Carriers.

67-902. **Filing of schedules by owners.—Contents.**—It shall be the duty of the owners of property mentioned in § 67-901, within the state, to file with the commission on or before the first day of April, biennially, in the odd years, under oath, schedules and statements giving the following information concerning all properties owned or leased by such owners: (1) the name of the company, its nature, whether a person, association, copartnership, corporation, or syndicate, and under the laws of what state or country organized; (2) the location of its principal place of business, the post office address of the president, general manager, or executive officer or officers; (3) the name and post office address of the chief officer or managing agent of the company in Tennessee; (4) the gross receipts of its business as a whole and also of its business done within the state, and operating expenses for the preceding fiscal year; (5) the total capital stock, number of shares issued or outstanding, the par face value thereof, and in case no shares of stock are issued, in what manner its capital is divided, and its holdings evidenced; (6) the market value of said shares of stock or capital on the tenth (10th) day of January next preceding, or if said stock or capital have no market value, then the actual value; (7) the real estate, buildings, machinery, fixtures, appliances and personal property owned by said company which is actually located within this state, the actual value thereof and the counties or municipalities in which the same are located; (8) real estate, together with the permanent improvements thereon, situated outside of the state and not directly used in the conduct of the business within the state, the purpose for

which it is used, its value and the sum at which it is assessed for taxation in the locality where situated; (9) the bonded indebtedness and the market value thereof, if it has such, otherwise its actual value.

In addition to the foregoing information to be given by each owner of property assessable under this chapter, said statement shall contain information as set out in §§ 67-903—67-911.

67-918. **Determination of value.**—Upon examination of every such schedule and statement and all other evidence taken by them, the said commission shall proceed to ascertain and determine the value of said property within the state for taxation and assess the same accordingly, taking into consideration the capital stock, corporate property, franchises, and gross receipts, the market value of the shares of stock and bonded indebtedness, and such other evidence as is afforded by said statements and schedules or other evidence taken to enable them to fairly and equitably fix the actual cash value of the properties of such persons.

67-919. **Apportionment of intangibles.**—The proportionate share of the value of the intangible property of such companies as do business in this and other states, growing out of the use of their tangible property in this state under their franchises, privileges, and contracts, shall have its situs in this state and in the several counties and municipalities thereof in which they exercise their rights; provided, that property of any such owner located outside of the state which is not directly used in the business to which the property in the state is devoted, shall not enter into the value of the property within the state to be assessed.

APPENDIX 2.

Aero Mayflower Transit Company, et al.,
Complainants-Appellants,
vs.
Cayce R. Pentecost, et al.,
Defendants-Appellees.

} Davidson Equity.

Court of Appeals of Tennessee Middle Section
at Nashville.

Appeal from the Chancery Court of Davidson County.

Honorable Ned Lentz, Chancellor

Stephenson, Lackey & Holman of Nashville, Solicitors for Complainants-Appellants.

George F. McCanless, Attorney General of Nashville, Milton P. Rice, Assistant Attorney General of Nashville, Walker T. Tipton, Assistant Attorney General of Nashville, Solicitors for Appellee—State Board of Equalization.

George Shuff of Nashville, Solicitor for Appellee—Public Service Commission.

Affirmed.

Filed .....

Chester C. Chattin,
Judge.

Complainants did not furnish the requested information. Nine of the complainants refused or failed to furnish the Commission with any information requested. However, twenty of the twenty-nine complainants did file schedules or statements of various amounts of mileage their trucks had operated into, within and through Tennessee during the year 1958.

The Commission made assessments for ad valorem taxes for the biennum 1959-60 against the complainants. The assessments were appealed to the State Board of Equalization which affirmed the assessments.

Thereupon, complainants filed a petition in the Chancery Court of Davidson County for the writs of certiorari and supersedeas. They also sought an injunction prohibiting the Commission from making distribution of the assessments to the various counties and municipalities of the state for ad valorem tax purposes. The petition prayed for a declaratory judgment declaring the rights of complainants and the extent to which movable properties must be in the state and the local political subdivisions thereof to be subject to local ad valorem taxes.

The theory of the petition is that T. C. A. 67-906 (2) which requires foreign irregular route motor carriers, such as complainants, to report to the Commission the total mileage traveled into, within and through the state as well as the total mileage into, within and through the various cities and counties of the state during a calendar year is unreasonable and impossible of performance; and, therefore, unconstitutional and void in violation of the commerce clause of the Federal Constitution.

It is further insisted that complainants did not have property habitually, continuously or with such frequency during the year 1958 in this state as to cause their property to have a situs in the state and especially in any county or city of the state for the purpose of local taxation for the biennum of 1959-60.

The defendants answered the petition in which it was denied that T. C. A. 67-906 (2) cast an unreasonable or impossible burden upon interstate commerce; and that complainants did not have trucks or vans in the state with such frequency to have a tax situs in Tennessee and its political subdivisions.

Prior to the trial Aero Mayflower Transit Company was permitted to withdraw as a party complainant.

The proof shows and the Chancellor found as a fact that it would be impossible for complainants to accurately log each and every mile traveled in each and every city and county of the state during a calendar year. However, he further found the Commission had not demanded a strict or literal compliance with this section of the Act. But had to the contrary accepted and based the assessments against those complainants which had furnished statements of mileage their trucks had traveled within, into and through Tennessee during the year 1958. Thus, he held they were not in a position to urge the unconstitutionality of the statute in this respect.

He dismissed the bill as to the nine complainants which had refused to furnish the Commission with any information as to the mileage their trucks had traveled in Tennessee during the year 1958 under authority of T. C. A. 67-913, which provides:

> "The owner of any such property refusing or failing to file such schedules and statements shall be deemed to have waived the mode and manner of ascertaining the value of such property, and of the distribution or allocation by the Tennessee Public Service Commission of such valuation or assessment to the various counties and municipalities of the State of Tennessee for the purposes of county and municipal taxation, and shall not be permitted to be heard in opposition to the valuation fixed upon said property by the Commission, nor in opposition to the distribution or allocation of same by the Commission to the various counties and municipalities for the purposes aforesaid."

He further held the tax was a state tax and not a local one.

He also declined to make a declaration of the rights and obligations of complainants under the Act.

Accordingly, he dismissed the petition.

Complainants have appealed to this Court and have in their very able and well prepared brief stated they rely upon the following three propositions:

> "1. The taxes for which assessment is provided under T. C. A. 67-901, et seq., are local taxes, and are not State taxes.
>
> "2. Under the due process clauses of the Federal and State constitutions a county, municipality, or taxing district cannot levy a tax upon personal property of a non-resident unless personal property of the non-resident has acquired a tax situs therein by being regularly and habitually within said county, municipality or taxing district.
>
> "3. The requirement contained in T. C. A. 67-906 that irregular route carriers shall report the number of vehicle miles operated in each county, municipality or taxing district in the State imposes upon the Appellants an impossible task, and one where even attempted compliance is very expensive, causes great delays and creates dangerous highway hazards. Such provision therefore creates an undue burden upon interstate commerce, and is void under the commerce clause of the United States Constitution. Since same is void, T. C. A. 67-913 must likewise be void, for the Appellants cannot be deemed to have waived the method of assessment and distribution thereof by failing to comply with a void requirement."

Conceding that the tax is local and not a state tax, yet that fact does not render the assessments void. The Commission is the proper authority for making assessments against complainants for local ad valorem taxation.

"The Tennessee Public Service Commission under T. C. A. 67-601 et seq., is the single agency required to assess for ad valorem taxation the property of all utilities and carriers operating in this state." Howard Sober, Inc. v. Clement, ... Tenn. App. ..., 372 S. W. (2d) 202.

Article 2, Section 28 of our Constitution provides in part as follows:

"All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State."

As to complainants' second proposition in which it is insisted that a county or a city may not levy a tax on personal property of a nonresident unless such property is regularly and habitually within its boundaries, we think has been settled by the reported decisions of this Court and our Supreme Court.

In the case of E & L Transport Company v. Ellington, ... Tenn. ..., 371 S. W. (2d) 456, it is said:

"Therefore, we conclude that:

"(1) appellants are irregular route motor carriers operating into or through Tennessee in interstate commerce;

"(2) such portion of their properties as is represented by the ratio of their Tennessee mileage to their total mileage has a Tennessee situs and is to be assessed for ad valorem tax purposes by the Tennessee Public Service Commission under T. C. A., Section 67-901 et seq.;

"(3) said statute is a valid and constitutional enactment, and has been so held without exception by the appellate courts of this State."

In the case of Howard Sober, Inc. v. Clement, supra, this Court said:

> "This statute was drafted and passed for the express purpose of furnishing statutory authority for the assessment of ad valorem taxes upon the property of irregular route haulers which was in Tennessee under such circumstances as to warrant its taxation. In the preparation of the statute, free use was made of other statutes enacted for similar purposes."

In the case of Jack Cole Company v. Ellington, ... Tenn. App. ..., 372 S. W. (2d) 204, wherein the same proposition was before the Court, it is said:

> "The record shows that a fair proportion of appellant's properties are used in Tennessee, although at irregular intervals, and that petitioner receives the benefit of Tennessee's laws, its roads and its other facilities thus enabling it to carry on its business in this State. And, although we cannot determine a fixed situs for these properties at any specific place, nevertheless, the statute provides that property so used in this State on the highways shall 'Be deemed to have a situs in Tennessee.' Thus, we think that the action of the Public Service Commission was tantamount to finding as a fact that such properties are so used in Tennessee as to come within this statute and therefore, have a situs in the State."

The foregoing finding of the Court finds support in the case of Central R. R. v. Pennsylvania, 370 U. S. 607, wherein it is said:

> "• • • A nondomiciliary tax situs may be acquired even if the rolling stock does not follow prescribed routes and schedules in its course through the nondomiciliary State. In American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. Ed. 899, 19 Ct. 599,

this Court sustained the constitutionality of a Colorado property tax on a stipulated average number of railroad cars that had been located within the territorial limits of Colorado during the tax year, although it was agreed by the parties that the cars 'never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains.' Id. 174 U. S. at 72. Habitual employment within the state of a substantial number of cars, albeit on irregular routes, may constitute sufficient contact to establish a tax situs permitting taxation of the average number of cars so engaged."

In Volume 17, No. 3 of the Vanderbilt Law Review, June, 1964, at pages 1161, 1162 and 1163, there is a discussion of the three opinions of our Supreme Court and this Court in which the constitutionality of T. C. A. 67-901, et seq., the statute under consideration, was upheld, wherein it is said:

"Taxes imposed on interstate carriers for the privilege of engaging in interstate commerce are forbidden by the commerce clause. This has not generally been true with respect to local property taxes *applied to* vehicles of interstate commerce. Although vehicles are employed to transport interstate commerce, that fact alone does not afford either due process or commerce clause insulation from nondiscriminatory state and local property taxes. A property tax on the vehicles of interstate commerce, such as barges, tank cars, pipe lines, rolling stock, trucks, buses, and airplanes is a familiar type of sanctioned tax. As to vehicles moving in interstate land transportation, such as in the three cases at hand, it has long been settled that a non-domiciliary state can levy a property tax on the basis of the 'fair average' number of vehicles permanently within the taxing state during the tax

year, although the individual vehicles traveling into, through, and out of the state differ. Vehicles of interstate transportation, if moving over fixed routes and regular schedules, may thus acquire a tax situs in several states, providing the states fairly apportion the taxes. The tax is open to attack on both due process and commerce clause grounds where it is not fairly apportioned to the use of the vehicles within the taxing state as compared to their use without.

* * * * * * *

"While it may be more difficult fairly to apportion a tax where the interstate carrier does not have a regular, scheduled route, as in the three cases at hand, nevertheless, such carriers should also pay their fair share of the cost of the state and local governments whose protection they receive and whose opportunities and benefits they enjoy. Moreover, exemption of these carriers from the tax would give them a competitive advantage over local carriers who must shoulder the tax burden."

Complainants admit they used a fair proportion of their properties in this State and received the benefit of our laws, roads, and other facilities during the year 1958. We quote from the petition:

"Petitioners admit and do not deny the fact that in the conduct of their business most of them have had vans and trucks in the State of Tennessee at various times and at various places, and certain of them have had property in the State habitually or continuously, but not in any county or city of the State."

We understand the complainants insist by their third assignment a strict compliance of T. C. A. 67-906 (2) on their part would result in an undue burden on interstate commerce. Conceding this to be true, yet it is obvious

to us from this record that the Commission has not insisted upon a strict compliance with this section of the Act. But, to the contrary, has accepted and based its assessments upon the information furnished by those complainants reporting mileage in the State which are at best estimates of miles traveled in the State during the year 1958. There is no insistence on the part of any of the complainants that such a construction of this section of the Act places a burden on interstate commerce.

Revenue laws are construed against the State and in favor of the taxpayer and a substantial compliance is all that is required. We are of the opinion the Commission has applied this rule in this case.

Under such circumstances we think the Chancellor was correct in finding the complainants were in no position to urge the unconstitutionality of the statute on this ground.

In the case of West v. Carr, ... Tenn. ..., 370 S. W. (2d) 469, our Supreme Court said and quoted with approval the following:

> "In these circumstances, it is plain that complainant's bill fails to state a cause under our Declaratory Judgments Act. That Act deals only with present rights that have accrued under presently existing facts. It gives the Court no power to determine future rights or possible controversies in anticipation of events that may not occur. Ball v. Cooter et al., 185 Tenn. 631, 634, 207 S. W. 2d 340, 342; Coleman v. Henry, 184 Tenn. 550, 554, 201 S. W. 2d 686; Jared et al. v. Fitzgerald et al., 183 Tenn. 682, 688, 689, 195 S. W. 2d 1, 4; Newsum v. Interstate Realty Co., 152 Tenn. 302, 278 S. W. 56; Annotations, 12 A. L. R. 52, 69, 87 A. L. R. 1205, 1215-1219.
>
> "It does not enable courts to give advisory opinions upon what the law would be upon a theoretical or hypothetical state of facts. Hodges v. Hamblen

County, 152 Tenn. 395, 399, 277 S. W. 901; Ball v. Cooter et al., supra; Jared et al. v. Fitzgerald et al., supra.

"'We will not pass on the constitutionality of a statute, or any part of one, unless it is absolutely necessary for the determination of the case and of the present rights of the parties to the litigation. Phillips v. West, 187 Tenn. 57, 213 S. W. 2d 3, 5' (State ex rel. Loser v. National Optical Stores Co., 189 Tenn. 433, 444, 225 S. W. 2d 263, 268). State ex rel. West v. Kivett, 203 Tenn. 49, 56, 308 S. W. 2d 833.

"The rule is the same, we understand, in the federal courts. 'Claims based merely upon "assumed potential invasions" of rights are not enough to warrant judicial intervention. Arizona v. California, 283 U. S. 423, 462, 51 S. Ct. 522, 75 L. Ed. 1154 (1169).' Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 324-325, 56 S. Ct. 466, 472-473, 80 L. Ed. 688, 699.

"Under the Federal Declaratory Judgment Act, as we understand, the rule is this: 'It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts' (Citing cases). Aetna Life Ins. of Hartford Co. v. Haworth, 300 U. S. 227, 241, 57 S. Ct. 461, 464, 81 L. Ed. 617, 621; Electric Bond & S. Co. v. Securities & Exch. Com., 303 U. S. 419, 443, 58 S. Ct. 411, 82 L. Ed. 936, 948.

"'This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly ad-

hered; one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied"' (citing cases). United States v. Raines, 362 U. S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524, 529."

Finally, the insistence of complainants the waiver section of the Act, T. C. A. 67-913, is void must fail since this insistence depended upon our finding the statute unconstitutional under complainants' third proposition which we have considered and found without merit.

It results complainants' assignments of error are overruled and the decree of the Chancellor is affirmed with costs.

Chester O. Chattin,
Judge.

Bejach, J., concurs.

Shriver, J., not concurring.

Humphreys, J., not participating.

APPENDIX 3.

Office of the Clerk
United States Court of Appeals
For the Sixth Circuit
Cincinnati,Ohio 45202

Carl W. Reuss
Clerk

November 17, 1966

Stephenson, Lackey and Holman
236 Fourth Avenue North
Nashville, Tennessee
Cordish and Cordish
1613 Munsey Building
Baltimore, Maryland

Re: Alterman Transport Lines, Inc., et al.
vs. Public Service Commission of
Tennessee, et al.
(D. C. No. 4417, Civil)

Gentlemen:

Enclosed is a copy of the Court's order entered today in the above-entitled case.

Yours very truly,

Carl W. Reuss,
Clerk,
Mary M. Lohre,
Deputy Clerk.

CC: Mr. Milton P. Rice
Mr. Eugene W. Ward
Mr. Seymour Samuels, Jr
Mr. William H. Williams
Mr. Patrick Johnson, Sr.
Mr. William W. O'Hearn
Mr. Earl S. Ailor
Mr. W. P. Boone Daugherty
Messrs. Eugene N. Collins and Ellis K. Meacham
Mr. James F. Turner
Mr. Robert M. Summitt

United States Court of Appeals
For the Sixth Circuit.

Alterman Transport Lines, Inc., et al.,
Appellants,

vs.

Public Service Commission of Tennessee, et al.,
Appellees.

Civil Action.
No. .....

Upon reading and filing the annexed Motion, dated the 9th day of November, 1966, it is

Ordered that the time of the Appellants to file the record on appeal herein and to take all steps necessary to the prosecution of this appeal and to docket the same, be and the same is hereby extended until thirty (30) days after the rendering of a final judgment on Appellants' direct appeal now pending before the Supreme Court of the United States.

Dated: Nov. 17, 1966.

John W. Pach,
Judge.